STATE OF MICHIGAN

COURT OF APPEALS

ROBERTA GORELICK,

Plaintiff-Appellant,

v

JAMES BENNETT BRAGMAN, D.O.,

Defendant-Appellee.

UNPUBLISHED
April 15, 2003

No. 236054
Oakland Circuit Court
LC No. 99-015287-CZ

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

In this action brought under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, plaintiff appeals as of right from the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff was employed by defendant as an office manager from October 1995, until her termination on March 9, 1999. According to plaintiff, her duties essentially consisted of general clerical work, the medical billing of patients and insurance companies, receptionist work, and patient registration. On December 24, 1998, plaintiff collapsed and was taken to the hospital. Plaintiff was diagnosed with multiple sclerosis and remained hospitalized until January 27, 1999. After being released from the hospital, plaintiff underwent intensive rehabilitation therapy.

On Saturday, March 6, 1999, plaintiff returned to work at defendant's office. According to plaintiff, she worked five hours that day and was capable of performing her job functions. Plaintiff alleged that defendant agreed that she could return to work full-time on March 10, 1999. However, on March 9, 1999, defendant informed plaintiff by telephone that she was terminated. Plaintiff brought the instant suit against defendant alleging a violation of the PWDCRA and intentional infliction of emotional distress.

On appeal, plaintiff contends that the trial court erroneously found that defendant's termination of her employment was not a violation of the PWDCRA. We disagree. A trial court's decision on a motion for summary disposition is subject to review de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454, 597 NW2d 28 (1999).

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10),

we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition under MCR 2.116(C)(10) is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co, supra* at 397.

To establish a prima facie case of employment discrimination under the PWDCRA, plaintiff must demonstrate that: (1) she is disabled as defined by the statute; (2) the disability is unrelated to her ability to perform the essential functions of her job; and (3) she was discriminated against in one of the ways described by the statute. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001). Pursuant to MCL 37.1202(1)(b), an employer shall not discharge an employee because of a disability that is unrelated to that individual's ability to perform the duties of a particular position. It is undisputed in this case that plaintiff has a disability as defined by the PWDCRA. Consequently, the pertinent question to be answered is whether plaintiff's multiple sclerosis affected her ability to perform her duties as defendant's office manager.

In addition to being plaintiff's employer, defendant was also her primary care physician until her termination. Defendant asserted that, in his medical opinion, the diminished cognitive functioning and fatigue experienced by plaintiff, as side effects of her multiple sclerosis, affected her ability to perform adequately as an office manager in a busy medical practice. Defendant also cited the affidavit of Lawrence Eilender, M.D., a board certified neurologist, who began treating plaintiff in February 2000 for her multiple sclerosis. Dr. Eilender stated in his affidavit that he reviewed plaintiff's previous medical records when he commenced treatment. After reviewing the records, he determined that plaintiff "would not have been able to return to work on a full-time basis and function adequately as either a receptionist or an office manager in March 1999 because of the side effects of her multiple sclerosis, namely excessive fatigue, weakness, difficulty in concentration, cognitive problems and memory loss."[1]

However, plaintiff asserts that work release documentation, provided by Steven Schechter, M.D.,[2] created a question of fact concerning her cognitive ability to return to work. Plaintiff presents a May 4, 1999 letter, in which Dr. Schechter notes her continued improvement and states that she may resume work activities with a wheelchair and walker. Likewise, plaintiff notes that Dr. Schechter signed a return to work certificate on August 10, 1999, indicating that plaintiff may return to work as of May 4, 1999, with a wheelchair or walker. However, neither the letter nor the return to work form state that plaintiff could return to work as of March 1999.

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[1] Defendant also presented the affidavits of several other physicians that treated plaintiff and opined that her multiple sclerosis prohibited her from returning to work full-time as an office manager. However, as noted by plaintiff, these physicians did not assess plaintiff's abilities at the time of her termination. See *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504, 506; 476 NW2d 451 (1991); see also *Doman v Grosse Pte Farms*, 170 Mich App 536, 542; 428 NW2d 708 (1988).

[2] We note that Dr. Schechter is board certified in neurology and treated plaintiff from December 1998 until December 1999.

Case law provides that the date of termination is the relevant date to consider when determining whether a disability affected an individual's ability to perform the essential functions of a position. *Rymar, supra* at 506.

More importantly, we note that neither of these documents offer any opinion regarding whether plaintiff could return to work, from a cognitive and fatigue standpoint, on a full-time basis. In *Hummel v Saginaw Co,* 118 F Supp 2d 811, 817 (ED Mich, 2000), the court determined that a physician's mere assertion that the plaintiff "may return to work with no restrictions," was insufficient to create a question of fact concerning her ability to return to her position. In the instant case, the conclusions stated in Dr. Schechter's letter and work release are not supported by any facts which might create an issue for trial. There is no evidence in these documents that Dr. Schechter considered the requirements of plaintiff's job, or tested her ability to fulfill those requirements. See *id*. To the contrary, Dr. Schechter explained in a subsequent affidavit that his recommendations did not reflect any impressions he had regarding plaintiff's cognitive ability to perform her job.[3] Consequently, this documentation did not create a question of fact concerning plaintiff's ability to return to her position as an office manager.

Plaintiff also argues that her affidavit creates a question of fact in this case. In her affidavit, plaintiff stated that that she was fully capable of performing her full-time job duties in March 1999. She` further noted that she performed a substantial amount of work on March 6, 1999, including rebilling approximately thirty insurance files, answering telephone calls, and handling other office related tasks, without any difficulty. We agree with the trial court's assessment that this affidavit failed to raise a question of fact. While plaintiff's affidavit contains some detail, the examples in the affidavit demonstrate only that she could perform limited tasks for five hours. See *Quinto v Cross & Peters Co,* 451 Mich 358, 371-372; 547 NW2d 314 (1996). This is not the type of detail that would permit a reasonable person to conclude that plaintiff could perform the tasks of her full-time job in light of unequivocal medical evidence to the contrary.

Plaintiff next asserts that the trial court erroneously failed to acknowledge the Beaumont Hospital discharge summary dated January 27, 1999. Specifically, plaintiff cites the section entitled "MENTATION/COGNITION," which lists the following categories: Orientation, Memory, Insight, Carryover, Initiation, Organization, Problem Solving, Attention Span, Motivation, Behavior, Judgment/Safety, and Following Direction. Next to these categories, the therapist checked the box labeled "intact." Again, this evidence does not assess plaintiff's cognitive abilities at the time of her termination in March 1999. *Rymar, supra* at 506.

In plaintiff's reply brief, she states that Ronald Smolarski, a vocational expert, clearly opined that plaintiff was capable of competently performing her job functions. However, we note that Mr. Smolarski also admitted that he did not know if plaintiff was physically capable of

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[3] We note plaintiff's argument that a party may not create a factual issue by submitting an affidavit that conflicts previous deposition testimony. *Kaufman & Payton, PC v Nikkila,* 200 Mich App 250, 256-257; 503 NW2d 728 (1993). However, we find that Dr. Schechter's affidavit clarifies, rather than contradicts, his earlier letter and work release form. See *Wallad v Access BIDCO, Inc,* 236 Mich App 303, 312; 600 NW2d 664 (1999).

working full-time as an office manager or receptionist. On this record, we conclude that the trial court did not err in granting defendant's motion for summary disposition.

Plaintiff ultimately asserts that the trial court abused its discretion in failing to enforce its scheduling order for dispositive motions. However, other than providing the appropriate standard of review, plaintiff failed to cite any authority in support of her argument. "A bald assertion without supporting authority precludes an examination of the issue." *Impullitti v Impullitti*, 163 Mich App 507, 512; 415 NW2d 261 (1987). Therefore, we decline to address this issue.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper